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No. 09- 091461

IN THE

Supreme Court of the United States

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, *et al.*,

Petitioners,

v.

ROMAN STEARNS, in His Official Capacity as Special Assistant to the President of University of California, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The University of California system (UC) requires its 86,000 in-state applicants, and California State University requires its 615,000 applicants each year, in order to be eligible for regular admission, to take 15 year-long courses that have been approved by UC, whether the applicant's school is a public, private, or religious high school. In its review, UC regularly rejects courses, regardless of their teaching standard content and skills, if they add a religious viewpoint, in Catholic, Jewish, and Protestant schools. The nearly 150 instances shown by UC's documents (App. 103a, ER443-86, 750-77) include UC's history course policy which was characterized in the UC committee minutes as meaning that "We simply do not accept supernatural causes" (ER1516-17); UC's rejection of the elective "Social Justice" at Verbum Dei High School on the ground that the text "only provides one point of view on the topics," "a Catholic point of view" (Ex.747); and UC's rejection of the "Holocaust and Human Behavior" course at New Community Jewish High on the ground of a "[n]eed to expand the perspectives for this course" (ER2400) because it was "too slanted towards Holocaust with no other perspective." (ER2411.)

The question presented is:

Whether the Ninth Circuit erred in holding constitutional under the First and Fourteenth Amendments the University of California system's rejection of courses in religious high schools (Catholic, Jewish, and Protestant) when they add to standard content a religious viewpoint, by

A. Holding that viewpoint discrimination by state

universities and agencies against religious speech in private schools is constitutional, directly contrary to this Court's decisions barring viewpoint discrimination in *Rosenberger*, *Lamb's Chapel*, *Widmar*, *Southworth*, *Boy Scouts*, and *R.A.V.*, and the Seventh, Eighth, Tenth, and Fourth Circuits;

B. Ruling that only the minimal rational basis test must be met by infringements of freedom of speech and other First Amendment protections when "government provides a public service," directly contrary to this Court's decisions using strict scrutiny and other circuits' decisions, by vastly extrapolating the *Finley*, *American Library*, and *Forbes* decisions beyond government selection of speech for subsidy to private speech involving any "public service"; and

C. Reinterpreting constrictively each First Amendment clause to uphold, the association standing test to exclude, and the overbreadth doctrine to ignore, the 150 other UC course rejections for adding a religious viewpoint to standard content, in conflict with this Court's decisions.

LIST OF PARTIES

The plaintiffs/petitioners in the court below are Association of Christian Schools International, Calvary Chapel Christian School (a Division of Calvary Chapel of Murrieta, Inc.); A.T., by parent G. Tally; J.G., by parent A. Guzon; T.C., by parent J. Cherney; K.B., by parent D. Brodmann; G.S., by parent K. Shean; S.O., by parent D. Ono; W.L., by parent W. Lotherington.

The defendants in the court below are Roman Stearns, in his official capacity as Special Assistant to the President of University of California; Susan Wilbur, in her official capacity as Director of Undergraduate Admissions of University of California; Judy Sakaki, in her official capacity as Associate Vice President for Student Academic Services of University of California (substituted for Dennis Galligani); Robert C. Dynes, in his official capacity as President of the University of California; and Mark Rashid, in his official capacity as Chair of Board of Admissions & Relations with Schools (BOARS) of University of California (substituted for Michael Brown).

Appearing as *amicus curiae* for petitioners in the Ninth Circuit were American Center for Law and Justice for Catholic League for Religious and Civil Rights, Common Good Foundation, and Seventh-day Adventist Church State Council; and National Legal Foundation; and in the district court were a group of law school professors discussing implications for Catholic universities. (ER1179.) Appearing as *amicus curiae* for respondents in the court below were California State University and University of Nevada; California Council for Science and Technol-

ogy; American Historical Association and Organization of American Historians; and American Association of University Professors.

RULE 29.6 STATEMENT

Petitioners Association of Christian Schools International and Calvary Chapel Christian School's parent, Calvary Chapel of Murrieta, Inc., are nonprofit organizations, and as such no parent or publicly held company owns 10% or more of their stock.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, dated January 12, 2010, is unreported and appears at 2010 WL 107035. App. 1a. Its denial of rehearing en banc, dated March 1, 2010, is unreported. App. 159a. The Ninth Circuit affirmed the facial and as-applied summary judgment decisions of the United States District Court for the Central District of California, dated March 28, 2008 and August 8, 2008, reported at 679 F.Supp.2d 1083 and 678 F.Supp.2d 980 respectively, App. 42a and 12a; the decision of the district court denying motions to dismiss was dated August 8, 2006. App. 121a.

The Ninth Circuit opinion, and the district court opinion it affirmed, uphold University of California's policy and well-established practice of rejecting private schools' courses that adequately teach standard content if they add a religious viewpoint. In doing so, the opinions make breathtaking departures from settled First Amendment precedent of this Court and other circuits, as they hold that viewpoint discrimination is permissible by a state university system, that only rational basis review applies to First Amendment violations when "government provides a public service," and that First Amendment provisions, standing rules, and the overbreadth doctrine may be reinterpreted constrictively to uphold UC's pattern or practice of 150 course rejections for adding religious viewpoints.

STATEMENT OF JURISDICTION

The Ninth Circuit opinion was rendered on January 12, 2010, App. 1a, and the petition for rehearing en banc was denied on March 1, 2010, App. 159a.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amends. I, XIV. App. 161a.

STATEMENT OF THE CASE

This case affects 86,000 applicants annually to the ten campuses of University of California (UC)(ER1451), and the 615,000 applicants annually to the 23 campuses of California State University (CSU), as well as students at other state universities such as University of Nevada (which filed an amicus brief in the Ninth Circuit). It determines whether applicants to UC from ACSI's 800 schools in California, and 3200 schools elsewhere (ER1519), and from the large number of students in Catholic schools and Jewish schools, will continue to be discriminated against when their schools add to standard course content their particular religious viewpoint.

Even more importantly, this case determines whether the Ninth Circuit's tunnel around the First Amendment will remain open, allowing viewpoint discrimination and using the rational basis test when religious speech is involved, as well as constrictively interpreting each First Amendment clause for religious speech, standing rules for the nation's largest religious school organization, and the overbreadth doctrine for discriminatory treatment of religious speech. In the Ninth Circuit, religious speech in religious schools is less protected than commercial speech, flag burning, and pornography.

Most of the facts are undisputed because they come from UC's own documents rejecting courses and stating its policies.

A. Framework of UC's Review and Approval of High School Courses as a Condition of

Regular Admission.

UC is the only university, and California is the only state (ER1048, 1485, 1493), that reviews high school course descriptions, and asserts the right to approve or reject them. UC does so in connection with its 86,000 in-state applicants each year for its ten campuses, and UC's review is adopted and followed by CSU's 23 campuses as well (ER1406), together constituting all state college education in California. UC's review is merely of course descriptions of 1-5 pages; "UC does not interview the teachers, observe classroom instruction, or test the students." App. 49a,50a. The review is by staff, not faculty (ER961-62, 1459), with rare exceptions.

Eligibility for regular admission[1] to UC requires taking 15 year-long courses that UC has pre-approved (ER1436),[2] and is how 98.8% of students (ER1446) are admitted to UC. A student who has not taken 15 year-long courses pre-approved by UC is ineligible for regular admission.[3] The remaining 1.2% of students are admitted on the basis of "exceptionally high scores on standardized tests" or excep-

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[1] Which UC terms "statewide eligibility" and "local eligibility." (ER1446.) 92.5% are eligible from the first, and 6.3% from the second. *Id.*; App. 122a.

Because the Ninth Circuit opinion did not cite facts, and the district court cited only facts from UC's brief, citations are provided to the Excerpts of Record (ER) for the Court's convenience, pursuant to S.Ct.R.12.7.

[2] These must be (a) 2 history-social sciences, (b) 4 English, (c) 3 mathematics, (d) 2 laboratory sciences, (e) 3 in languages, (f) 1 arts, and (g) 1 elective year-long courses. App. 123a.

[3] Such a student is ineligible at the 10 campuses of UC and the two-dozen campuses of California State University, which follows the same requirement. (ER1048,1406.)

tional athletic or artistic ability. ER127a & n.2.

In 2004, UC began to reject courses that contain adequate standard content but add a religious viewpoint, implementing a policy or practice that is described below. (ER2413, 1483, 1477.) When UC has rejected sufficient courses in any required subject, a school's students are rendered ineligible for regular admission, and that has been the case in at least 10 ACSI member schools. (ER1530, SER3109-3279.)

B. ACSI Members' Addition to Standard Course Content of a Religious Viewpoint.

ACSI, the nation's largest private school organization with 4000 member schools (ER1519),[4] and Calvary Chapel (a member school) and students, filed this lawsuit on behalf of ACIS member schools to challenge UC's rejection of courses with standard content because of an added religious viewpoint, claiming that was viewpoint discrimination in violation of the First Amendment. ACSI schools teach standard content (SER3715-17, ER643-44, 422), which is defined by California's content standards for each subject (Exs.675, 682, 685), which virtually all of the 800 ACSI schools in California meet. Virtually all of the ACSI member schools in California are accredited by the regional accreditation organization, Western Association of Schools and Colleges. (ER736, 734.)

ACSI member schools, besides teaching standard course content, add a religious viewpoint in each

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[4] In 110 denominations, with over 800 schools in California. (ER1519.)

subject. They do so as an important part of the schools' and students' religious speech and belief, and as an integral part of their reason for existence. (ER733, 3716-17.) Religious schools generally exist to add an alternative viewpoint to what public schools offer. (ER733, 643-44, 617, 736.) Doing so does not diminish the teaching of standard content (ER606, 610, 617), but instead enriches it and challenges critical thinking. (ER727, 609.)

C. UC's Rejection of Religious School Courses for Addition of a Religious Viewpoint, While Approving Courses that Add Secular Viewpoints.

Under its 2004 policy or practice, UC rejected nearly equal numbers of Protestant, Catholic, and Jewish school courses with standard content because they added a religious viewpoint (ER443-86, 750-77, 1981-2454), before rejections were stopped or slowed after the filing of this suit. The district court acknowledged that ACSI identified "more than 150 courses rejected by UC." App. 103a.

UC's rejections of courses with standard content because of added religious viewpoints have included all subject areas except mathematics: (1) elective courses (religion, ethics, philosophy), (2) history and social science courses, (3) English courses, (4) any courses with an added providential viewpoint, and (5) science courses. However, UC approves courses with secular viewpoints (as it should), whether feminist, African-American, environmentalist, or otherwise. The following examples of UC's viewpoint discrimination toward added religious viewpoints were specifically brought to the Ninth Circuit's attention:

1. Examples of Rejected Elective Courses (Religion, Ethics, Philosophy)

UC rejected "Women's Studies" from Saint Mary's Academy (ER2368-75). UC's reviewer asked the other reviewers, "Does anyone think this is too narrow a viewpoint? I was going along and thinking it was a pretty good course until the outline mentioned the Catholic point of view in the texts." (ER2369.) The reviewers then unanimously rejected the course for being "too specific in viewpoint." (ER2368. *Accord* ER2322.) Thus, the course was "pretty good" except for its "Catholic point of view," which is viewpoint discrimination against religious speech.

UC similarly rejected "Jewish Philosophy" from New Community Jewish High (ER2421-33). Petitioners' philosophy expert witness (a UC professor) said the course covered such very sophisticated philosophy readings that he was amazed this college material was taught in a high school. (ER683-86, 373-77, 380-81.) UC rejected the course for a "[o]ne-sided perspective. If expanded has potential." (ER2436. *Accord* ER365-79, 685, 687-88.) The course was not deficient, except its "[o]ne-sided perspective"—its Jewish viewpoint added to more-than-standard content, which is viewpoint discrimination.

By contrast, UC regularly approves courses with a single secular viewpoint, such as "Women's Studies and Feminism," "Diversity Studies," "Post Modern Questions in Art," and "Multicultural Perspectives." (ER1469, Costales Dep.at 178-180; *accord* ER1703;Ex.754)

2. Examples of Rejected History/Social Science Courses

UC rejected "Christianity's Influence on American History" from plaintiff Calvary (ER1981-99), on the ground, "Need more than a religious perspective, too slanted toward Christianity." (ER1994.) The only reason given was the added viewpoint "slanted toward Christianity," which is viewpoint discrimination. The course sufficiently covered standard content so that UC's expert witness believed it should have been approved. (ER912.)

UC rejected "History of Christianity" from Cathedral Catholic High School (ER2328-31), stating as the reason, "We would expect a course in the History of Christianity to include more than one Christian viewpoint." (ER2328.) The reason was not any deficiency except "one Christian viewpoint," which is viewpoint discrimination against religious speech.

By contrast, UC regularly approves history and social science courses with a single secular viewpoint (ER1127, 1129-31, Ex.678), and has a policy statement that "history courses may view historical events from a particular perspective, such as African-American history, Woman's history, or the Latin American Experience" (ER1408; *accord* ER1469) —but not from a religious perspective. UC interprets this policy to allow only the listed perspectives. History courses are approved with African-American, feminist, or Latino perspectives, but not with a perspective of "Christianity's Influence on American History." (ER1981.)

3. Examples of Rejected English Courses

UC rejected "Grammar and Composition" from Cornerstone Christian School (Ex.621), because of "concerns about the 4th quarter reading material. . . .The curriculum in general looks fine." After three quarters of standard secular literary works, the fourth quarter curriculum (not even required by UC for a full-year English course) listed the books *Foundations of Christian Education, The Philosophy of the Christian Curriculum*, and *Nurturing Children in the Lord*. UC found the "curriculum in general looks fine" except for these "4th quarter" books with an added religious viewpoint, which is viewpoint discrimination against religious speech.

UC also rejected "Introduction to the New Testament" from St. Bernard's Catholic School as an English course, on three grounds including that UC 'could consider this as a literature course if different viewpoints were reflected in the reading list.' (ER2264.)

By contrast, UC regularly approves courses with a single secular viewpoint, such as "Feminine Perspectives in Literature," "Gender Roles in Literature," "Gender, Sexuality and Identity in Literature," "Literature of the Counterculture," and "Literature of Dissent." (ER1469, Costales Dep. at 178-180; *accord* ER2267-2307, 1469.)

4. Examples of Rejected Courses with Providential Explanations

When UC rejected "American History" and "World History" courses at Armona Union Academy (ER2009), its reviewer stated she was "leery of how much religion we can allow in specific courses. The text books they are using are fine but am concerned with the following statements. . . .'The role of God in history and the principles of Christianity form a backdrop for our analysis of historical events and trends.'". . . (ER2022.) The texts were "fine" but the viewpoint of a "role of God in history" was fatal, which is viewpoint discrimination against religious speech.

UC rejected the "World History" course at King's Academy, while saying "the outline looks decent" (ER2035), on the basis that, in a religious viewpoint added to standard course content, "it attributes historical events to supernatural causes" (ER2025), after UC's reviewer concluded the course "is fundamentally flawed, since it presupposes that a Christian god [*sic*] has created and governed the world." (ER2036.) UC's approach was approved by UC's officer in charge of course review, Vice President Susan Wilbur (*e.g.*, ER2027).

These are UC's actual reasons for rejection, as stated in its documents. The reasons that UC later gave to the particular schools often differed because UC sanitized them.

D. UC's Policy or Practice of Rejecting Religious School Courses for Addition of a Religious Viewpoint, While Approving Courses that Add Secular Viewpoints.

That this is a well-established UC policy or practice is shown not only by the nearly 150 course rejections acknowledged by the district court (ER443-86, 750-77), from which the foregoing examples are taken, but by UC's policy on elective courses (religion and ethics courses, App. 160a) acknowledged by the district court (App. 111a), and by policy directives from UC's officer in charge of course review, Vice President Susan Wilbur.

UC's Religion and Ethics Courses Policy states that approved courses may not add a single religious viewpoint. Its language is that "to be considered as history, social science, and English courses, courses in religion or ethics . . . should treat the study of religion or ethics from the standpoint of scholarly inquiry rather than in a manner limited to one denomination or viewpoint." App. 160a (ER1485). Wilbur interprets this single religious viewpoint rule to apply to all subject areas. (ER1996.) The policy makes the insulting assumption that study of a subject, such as ethics, from "one denomination or [religious] viewpoint" cannot be scholarly inquiry, while study from one secular viewpoint is not disqualified and can be scholarly inquiry. This policy, App. 111a, 55a, was the basis for rejection of many of the courses discussed *supra*.

UC's officer in charge of course review stated UC policy for history and social science courses. If "an American government course provides all standard material on the subject of American government accurately, and in addition, provides a Christian perspective on American government as the only perspective," then "we would probably not accept a single perspective." (ER969. *Accord*, ER1483-84, 963-

64.) Wilbur stated the same policy for English courses, science courses, and any courses adding a providential viewpoint, regardless of whether they teach standard content.[5]

By contrast, UC's Board of Admissions and Relations with Schools (BOARS) stated an opposite UC policy for added secular viewpoints: "history courses may view historical events from a particular perspective, such as African-American history, Woman's history, or the Latin American Experience" (ER1408; *accord* ER1469) This allows "a particular perspective," or a single viewpoint, so long as it is secular. UC's practice or policy has been to approve courses in all fields with an added secular viewpoint.

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[5] Her statements of UC policy include the following (*accord* ER963-64,966-69):

On rejecting English courses: Wilbur testified that, if "an English course, provides all standard material on English or literature, and in addition, provides a Christian perspective on the subject matter but not other perspectives," "we would probably not accept the course." (ER967-68.)

On rejecting science courses: Wilbur stated UC's "requirement that science be taught in a UC-approved science class, and religion taught elsewhere." (ER1528. *Accord* ER1477, 1497, 963.) When ACSI's president questioned her about courses that taught standard science content and added a religious viewpoint, Wilbur said that it did not matter if standard content was taught: "Your position appears to be that as long as a science course contains a certain amount of specified information, it does not matter what else is included in the course, we must approve it or we are violating your rights. We do not agree. . . ." (ER1528.)

On rejecting any courses with providential viewpoints: Wilbur created and sent out a form letter rejecting history courses that "attribut[e] historical events to supernatural causes" (ER2027; *accord* ER2036, 903), regardless of whether they adequately taught standard content.

There is no constitutional difference between singling out and discriminating against an added religious viewpoint, and singling out and discriminating against an African-American viewpoint, women's viewpoint, or Latino viewpoint. Each is viewpoint discrimination against speech.

UC's prohibition on an added religious viewpoint means that religious schools may not state that what they teach is true, in any approved class, as UC's expert witnesses confirmed. A Catholic school's philosophy course may not teach that Thomas Aquinas' teachings are true if its course is to receive approval. (ER915.) A religious school's history course may not teach as truths that "in God we trust," that America is "one nation under God," that we are "endowed by our Creator with unalienable rights," or that "the Ten Commandments are true," and receive approval. (ER923-28; *accord* ER910.)

This case does not involve a challenge to legitimate UC admission standards, or telling UC what it can teach within its halls. Instead, the case involves UC's viewpoint discrimination against courses in private religious high schools, which teach standard content, *because* they add a religious viewpoint. It involves UC telling private schools in California what speech is impermissible in order for their students to remain eligible for regular admission (the 98.8% of seats), and claiming that "reasonable distinctions among viewpoints are consistent with the First Amendment." (9th Cir. Br. 40.) Yet the other 49 states and all private universities do not find any need for such an admission policy, nor does UC find such a need when it considers admission of the 15%

of students who are either out-of-state (U.S.) or foreign.

The basis for federal jurisdiction in the District Court was under 28 U.S.C. §1331, and the case was timely appealed under 28 U.S.C. §1291.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit erred in holding constitutional under the First and Fourteenth Amendments the University of California system's rejections of courses in religious high schools (Catholic, Jewish, and Protestant) when the schools add to standard content a religious viewpoint, by (A) allowing viewpoint discrimination against that religious speech by public institutions, (B) requiring only a rational basis to permit that viewpoint discrimination, and (C) constrictively reinterpreting the First Amendment, the association standing test, and the overbreadth doctrine to avoid considering UC's pattern or practice of 150 course rejections with similar viewpoint discrimination.

That flies in the face of this Court's oft repeated description of a central meaning of the First Amendment as a high barrier to viewpoint discrimination and content discrimination:

> But above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. [Citations omitted.]. . . The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*. . . .

Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972).

A. The Ninth Circuit's Ruling that Viewpoint Discrimination by State Universities and Agencies against Religious Speech in Private Schools Does Not Violate the First Amendment Conflicts with Decisions of This Court and the Seventh, Eighth, Tenth, and Fourth Circuits Barring Viewpoint Discrimination, and Warrants Granting the Petition.

UC's rejection of religious school courses with standard content for adding a religious viewpoint cannot be called anything but viewpoint discrimination, under this Court's forum and nonforum decisions alike. By contrast, UC consistently approves other school courses that add a nonreligious viewpoint. In effect, UC treats added religious viewpoints as toxic and religious speech as second class, or barely protected, while it discriminatorily finds nonreligious viewpoints harmless and secular speech fully protected. "Those choices and assessments, however, are not for the Government to make." *Citizens United v. FEC*, 130 S.Ct. 876, 917 (2010). The consequence of UC's viewpoint discrimination is that religious schools are penalized, by course rejection, for doing what most of them exist to do, and can only avoid viewpoint discrimination by self-censoring religious speech and implicitly teaching that religious viewpoints are irrelevant, outdated, and wrong.

Yet the Ninth Circuit ruled that UC is not shown to violate the First Amendment by such viewpoint discrimination. App. 3a-4a. It affirmed the district court's holding that UC officials "necessarily facilitate some viewpoints over others in judging the excellence of those students applying to UC," App.

25a,102a, instead of those officials conducting viewpoint-blind reviews of test scores, grades, and applications. It also affirmed the district court's holding that, to prevail, "Plaintiffs would have to show that Defendants [UC] rejected the challenged courses to punish religious viewpoints [animus][6] rather than out of *rational concern about the academic merit of those religious viewpoints.*" App. 25a (emphasis added). Yet if a religious school course teaches standard content and skills, it is none of government's business whether its added religious viewpoints have "academic merit," and certainly not government's right to discriminate based on "rational concern" about the added viewpoints.

UC has candidly admitted it practices viewpoint discrimination, and claimed a right to do so that was upheld by the courts below. As UC said in its appellate brief, "a course may be unsatisfactory precisely because it is too narrow or includes only one viewpoint," and so "UC considers whether a viewpoint or perspective (religious or not) promotes or detracts from a course's ability to meet faculty's expectations." (9th Cir. Br. 25 & n.24.) UC claims that educators "must have the discretion to evaluate and approve or disapprove the means, content, and viewpoints of academic expression," even though they "necessarily include judgments about speech." (*Id.*32, 33.) "Because UC's guidelines and course review further UC's educational mission, any reasonable distinctions among 'viewpoints' are consistent with the First Amendment," UC contends. (*Id.*40.)

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[6] The district court held that a "claim under the Free Speech Clause" required a showing of animus, including a claim that government disfavored viewpoints. App. 81a.

1. The Ninth Circuit's Justification of Viewpoint Discrimination Is Contrary to This Court's Decisions in *Rosenberger*, *Lamb's Chapel*, *Southworth*, *Boy Scouts*, *R.A.V.*, and to the Seventh, Eighth, Tenth, and Fourth Circuits' Decisions.

Assuming that analysis, the Ninth Circuit held that "plaintiffs have not alleged facts showing any risk that UC's policy will lead to the suppression of speech," and thus that UC's viewpoint discrimination does not facially violate the First Amendment. App. 3a. However, this Court has held that viewpoint discrimination alone shows precisely such a risk. "For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech," and beyond that "is a denial of their right of free speech." *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 836-37 (1995). Moreover, this case involves not just a risk of suppression of speech, but an actual suppression of speech shown in the foregoing and other examples of UC's viewpoint discrimination.

The Ninth Circuit showed what it required to show a risk of suppression of speech when it held that "UC's rejections of the Calvary courses were reasonable and did not constitute viewpoint discrimination." App. 5a-6a. Yet Calvary's history course was rejected for a single reason: "Need more than a religious perspective, too slanted toward Christianity." (ER1994.) Calvary's government course was rejected for one reason: "Textbook is not appropriate. One sided presentation of history curriculum; needs balance." (ER2007.) Calvary's Eng-

lish course was rejected because it "does not offer a non-biased approach" (its added religious perspective) (ER2051) and the text "insists on specific interpretations" (again the added perspective) (SER0427). Calvary's religion course was rejected primarily because it violated UC's Religion and Ethics Policy because of adding "one . . . viewpoint." (ER2193, 1172.) Each rejection was viewpoint discrimination.

To the contrary, this Court's decisions have consistently struck down viewpoint discrimination as an "egregious" violation of freedom of speech. As *Rosenberger* held,

> When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. . . . Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the . . . perspective of the speaker is the rationale for the restriction.
>
> . . . .
>
> The Court [in *Lamb's Chapel*] relied on no such distinction in holding that discriminating against religious speech was discriminating on the basis of viewpoint. . . .

Id. at 829, 832.

Discrimination against religious viewpoints, or religious speech, constitutes viewpoint discrimination. "Religion . . . provides . . . a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831. That is why

"discriminating against religious speech was discriminating on the basis of viewpoint." *Id.* at 832. Consequently, *Rosenberger* found viewpoint discrimination in denying equal state university funding for student publications that "offer a Christian perspective." *Id.* at 830.

Lamb's Chapel similarly held that a public school "discriminates on the basis of viewpoint" in violation of freedom of speech, if it permits "presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." The six-member majority said (the rest of the Court concurring):

> The principle that has emerged from our cases "is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 393, 394 (1993). *Accord Good News Club v. Milford Central Sch.*, 533 U.S. 98, 106-07, 110-12 (2001); *Cornelius v. NAACP*, 473 U.S. 788, 806 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 511 (1969).

Cases not involving forums condemn viewpoint discrimination exactly as forum cases do. *Southworth* stated that "[t]he whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views." *Board of Regents v. Southworth*, 529 U.S. 217, 235 (2000). *Accord Boy Scouts v. Dale*, 530 U.S. 640, 654 (2000); *Hurley v. Irish-American Gay, Lesbian & Bisexual*

Group, 515 U.S. 557, 579 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992) ("goes even beyond mere content discrimination, to actual viewpoint discrimination.... St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763 (1988); *Healy v. James*, 408 U.S. 169, 187-88 (1972).

Other circuits conflict with the Ninth Circuit's refusal to find viewpoint discrimination in UC's rejection of courses because of added religious viewpoints, even while approving courses with added secular viewpoints, as well as conflicting with the Ninth Circuit's willingness to uphold viewpoint discrimination if a mere rational basis is shown (Section B *infra*). The Seventh Circuit held it was viewpoint discrimination to refuse use of a municipal hall for programs promoting or espousing "a particular viewpoint" (a religious one), while allowing use for programs with multiple viewpoints. *DeBoer v. Village of Oak Park*, 267 F.3d 558, 571-74 (7th Cir. 2001). That circuit also ruled it was viewpoint discrimination to revoke campus recognition of a religious organization that denies voting membership to people not holding its beliefs, while recognizing other organizations with the same membership restriction. *Christian Legal Society v. Walker*, 453 F.3d 853, 865-67 (7th Cir. 2006). The Eighth Circuit held it was viewpoint discrimination to refuse religious viewpoints on specialty license plates, while allowing other viewpoints. *Roach v. Stouffer*, 560 F.3d 860, 869 (8th Cir. 2009). That circuit also ruled it was viewpoint discrimination to exclude teachers from after-school religious programs, but not from other after-school programs.

Wigg v. Sioux Falls School Dist., 382 F.3d 807, 814 (8th Cir. 2004). The Tenth Circuit held it was viewpoint discrimination to refuse one speaker because of his perspective, while allowing other speakers at a public meeting. *Mesa v. White*, 197 F.3d 1041, 1047-48 (10th Cir. 1999). The Fourth Circuit held it was viewpoint discrimination to charge religious groups and others for after-hour use of school facilities, while allowing free use for some groups. *Child Evangelism Fellowship v. Anderson School Dist.*, 470 F.3d 1062, 1067-68 (4th Cir. 2006).

2. The Ninth Circuit's Other Justifications of UC's Viewpoint Discrimination Also Conflict with This Court's Decisions.

The Ninth Circuit gave three justifications for UC's viewpoint discrimination. Each ignores the principles that "discriminating against religious speech was discriminating on the basis of viewpoint," and that viewpoint discrimination violates the First Amendment. *Rosenberger*, 515 U.S. at 832. *Accord Lamb's Chapel*, 508 U.S. at 393.

First, the Ninth Circuit found comfort in the ability of religious schools to "teach[] whatever and however they choose" in rejected courses. App. 3a. That is much like saying African-Americans were able to ride wherever and however they chose in the back of buses. This Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression." *Consolidated Edison v. PSC*, 447 U.S. 530, 541 n.10 (1980). *Accord, FEC v. Wisconsin Right To Life*, 551 U.S. 449, 477 n.9 (2007). To limit religious perspectives to rejected courses

conveys the message that they are second class speech, barely tolerated, and that religious perspectives are improper or wrong in academic fields like ethics, history, social science, English, and science.

Second, the Ninth Circuit upheld the UC Religion and Ethics Courses Policy on the basis that "[p]rivileging one tradition or point of view is considered unacceptable and counter-productive in the scholarly study of religion at UC and similar colleges and universities." App. 4a. However, that is only one of two approaches (ER2214) to the scholarly study of religion (that of many secular universities), and the other approach, preferring the sponsoring religion, is widely used and considered academically acceptable by religiously-affiliated universities, such as Notre Dame, Catholic University, and Princeton. (ER2205-13, Ex.653-55, ER669.) UC's policy is wrong as a statement of "the" college and university approach (ER362, 381-85, 687-88), as well as facially viewpoint discriminatory.

Third, curiously, the Ninth Circuit denied "that UC has a well established practice of rejecting courses with standard content solely because they add a religious viewpoint." App. 4a. It is hard to imagine a more well-established practice or policy than nearly 150 course rejections, the officer-in-charge's directives, and the UC Religion and Ethics Courses Policy. The Ninth Circuit's only reason for its denial was "that UC has approved courses with religious content and viewpoints as well as courses that used religious textbooks." However, the opinion failed to note that most approved courses predate UC's implementation of the viewpoint discriminatory policy in mid-2004 (until stifled by this lawsuit in

mid-2006), and that UC's policy or practice rejects courses with a single religious viewpoint rather than courses with multiple religious viewpoints. (ER966,1996-97.)

B. The Ninth Circuit's Ruling that Only the Minimal Rational Basis Test Must Be Met by Infringements of Freedom of Speech and Other First Amendment Protections When "Government Provides a Public Service" Conflicts with Decisions of This Court and the Fourth, Seventh, and Eighth Circuits, and Warrants Granting the Petition.

UC's rejection of religious school courses with standard content for adding a religious viewpoint is held to the most rigorous standard, not minimal scrutiny, under this Court's decisions. Were UC to reject a private school course because of an added secular viewpoint, the rejection certainly would be seen as viewpoint discriminatory on its face and would be overturned.

Yet the Ninth Circuit eviscerated the standard that violations of freedom of speech must meet in order to be permitted—from strict scrutiny to the mere rational basis test—when "government provides a public service."[7] App. 2a. It affirmed the district court's holding that "Defendants' course approval de-

[7] UC does not provide a "public service" at all, by its requirement for course review in order for a high schools' students to be eligible for regular admission; it is instead an intrusion into private schools necessitated by UC's own self-appointed review. That regular admission is 98.8% of total admission. (ER1446.)

cisions are subject to rational basis review," requiring ACSI to show that each "course was irrationally rejected." App. 28a, 40a. It affirmed the holding that if UC's "Policies are rationally related to the goal of selecting the most qualified students for admission, they do not violate the First Amendment's guarantee of free speech." App. 70a-71a; *accord* App. 13a, 25a, 64a, 76a, 78a-79a, 101a. What the district court meant by the rational basis standard was that UC's action "may be based on rational speculation unsupported by evidence or empirical data" (as was in fact the case), and "the burden is on the one attacking the [regulation] to negative every conceivable basis which might support it." App. 79a n.20, 70a-71a, 28a. Overall, the Ninth Circuit eviscerated the rule that viewpoint discrimination is prohibited. Instead, the Ninth Circuit allowed content discrimination generally and (contrary to the very cases on which it relied) viewpoint discrimination so long as there is a mere rational basis, whenever the speech discrimination is by a state university system or other "public service." That conflicts with the decisions of this Court and other circuits.

1. The Ninth Circuit's Ruling that Viewpoint Discrimination and Other Freedom of Speech Infringements Are Permissible under a Mere Rational Basis Test When "Government Provides a Public Service That . . . Requires . . . Distinctions Based on the Content of Speech" Conflicts with This Court and the Fourth, Seventh, and Eighth Circuits.

The Ninth Circuit asserted as a general rule that "[t]he Supreme Court has rejected heightened scru-

tiny where, as here, the government provides a public service[8] that, by its nature, requires evaluations of and distinctions based on the content[9] of speech." App. 2a. UC's claim, as stated in its appellate brief (UCB32), is that because it must select among applicants, it

> must have the discretion to evaluate and approve or disapprove the means, content, and viewpoints of academic expression.

However, there is nothing about selecting students for public university admission that requires a university to "approve or disapprove" any "viewpoints"—that is instead classic viewpoint discrimination. And there is nothing about reviewing high school course descriptions for adequate preparation that requires a university to "approve or disapprove" any "viewpoints," nor do any of the other 49 state universities or any private universities claim a need to review high school courses. UC only "requires evaluations of and distinctions based on the content of speech" or of its "content, and viewpoints" because it appointed itself reviewer of private school speech, decreed that not just standard course content but added viewpoints must be evaluated, and deputized

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[8] UC's self-appointed review of public, private, and religious high school courses does not involve subsidy of any schools, much less of their speech. UC's selection among applicant students does not involve any subsidy of their speech, whether or not it involves subsidy of a college education. Neither process is remotely like government selection of speech to subsidize, among artist applicants for grants, among databases to fund in local libraries, or among potential participants in educational television debates.

[9] Of course, when state action is both content-based and viewpoint discriminatory, "viewpoint discrimination is the proper way to interpret" and analyze it. *Rosenberger*, 515 U.S. at 831.

itself as the thought police to ferret out dangerous added religious viewpoints.

The assertion that "[t]he Supreme Court has rejected heightened scrutiny" when "government provides a public service" is equally fallacious, and conflicts directly with this Court's precedent. *Rosenberger* spurned another state university's claim that its selection necessitated viewpoint discrimination:

> [T]he underlying premise that the University could discriminate based on viewpoint if demand for space exceeded its availability is wrong as well. The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity.

515 U.S. at 835. *Widmar* rejected another state university's argument that it could conduct content discrimination or viewpoint discrimination in selecting among applicants for university meeting space. It struck down a prohibition on "use of University buildings or grounds 'for purposes of religious worship or religious teaching'" as a violation of freedom of speech, because "content-based exclusion of religious speech... violates the fundamental principle that a state regulation of speech should be content-neutral." *Widmar*, 454 U.S. at 265, 277. *Bakke* similarly rejected UC's claim that its need to evaluate and select students, and its freedoms as a university, allowed it to select on a prohibited basis, the color of their skin, warning UC that "constitutional limitations protecting individual rights may not be disregarded." *Regents of University of California v. Bakke*, 438 U.S. 265, , 314 (1978). *Southworth* insisted that another state university must follow "the standard of viewpoint neutrality" in its selection of student organizations to fund. 529 U.S. at 230, 233.

Analogously, this Court has required, not rejected, strict scrutiny of content-based selection when it involved "a public service," though government often claimed that it may and must make content-based decisions. *E.g., Capitol Square Review & Advisory Board v. Pinette,* 515 U.S. 753, 761 (1995) (providing places for monuments in public plaza); *Widmar,* 454 U.S. at 269-70 (providing university meeting space). If content-based selection does not invoke minimal scrutiny because of "a public service," *a fortiori,* viewpoint-based selection does not invoke minimal scrutiny.

Thus, this Court has never used (or even hinted at) the rational basis test for viewpoint-based selection, as the Ninth Circuit did, and has never even used strict scrutiny, but has instead simply struck down viewpoint discrimination without weighing the state interest or the narrowness of means[10] (such as *Rosenberger, Lamb's Chapel,* and *Good News*). *E.g., Wigg,* 382 F.3d at 814 (8th Cir. 2004); *Mesa,* 197 F.3d at 1047 (10th Cir. 1999).

Similarly, other circuits have never used (or hinted at) the rational basis test for viewpoint-based selection, even when it involved "a public service," placing at least the Fourth, Seventh, and Eighth

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[10] However, UC's policy or practice is not required by a compelling interest and does not employ the least burdensome means. One of many proofs is that "UC does not review courses taken by applicants from out-of-state high schools . . . , which comprise approximately fourteen percent of the applicant pool and about nine percent of admitted students," App. 50a(ER1451,1691), or from foreign high schools, another 3%. (ER1451.)

Circuits in conflict with the Ninth Circuit. *E.g.*, *Child Evangelism*, 470 F.3d at 1067-68 (school facility use); *DeBoer*, 267 F.3d at 568-69, 571-74 (municipal hall use); *Christian Legal Society*, 453 F.3d at 865-67 (campus recognition); *Wigg*, 382 F.3d at 814 (after-school facility use).

2. The Ninth Circuit's Vast Extrapolation of *Finley, American Library,* and *Forbes* and Their Rational Basis Test, from Government Selection among Speech To Subsidize to "Government Provid[ing] a Public Service" and to Regulation of Private Speech, and from Content-Based Decisions to Viewpoint Discrimination, Conflicts with This Court's Decisions.

The Ninth Circuit based its rational basis review of UC's viewpoint discrimination on this Court's decisions in *NEA v. Finley*, 524 U.S. 569 (1998),[11] *United States v. American Library Ass'n*, 539 U.S. 194 (2003) ("*ALA*"), and *AETC v. Forbes*, 523 U.S. 666 (1998).[12] Yet those decisions prohibit viewpoint discrimination, are limited to government selection among speech to subsidize, and do not involve government regulation of private speech.[13] The Ninth Circuit's leap from content-based decisions about

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[11] *Finley* does not support use of rational basis review at all.

[12] *Finley* upheld NEA grant selection based on artistic excellence. *ALA* upheld federal restrictions on its grants to public libraries to avoid use for online pornography. *Forbes* upheld public television selection of only major candidates for televised debates using broadcaster editorial discretion.

[13] Nor does this case involve governmental speech. *Pleasant Grove City v. Summum*, 129 S.Ct.1125,1131, 172 L.Ed.2d 853 (2009).

subsidized speech to viewpoint discrimination in regulating private speech is as breathtaking as it is seriously mistaken.

Those decisions expressly say that viewpoint discrimination is forbidden in any event. *Finley* prohibited "suppression of dangerous ideas," and said its result would differ if the policy "raise[d] concern about the suppression of disfavored viewpoints." 524 U.S. at 587. *ALA* held that "viewpoint-based restrictions are improper 'when the [government] does not itself speak or subsidize transmittal of a message it favors'." 539 U.S. at 213 n.7. *Forbes* held, "To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint." 523 U.S. at 682. *Accord, Citizens United*, 130 S.Ct. at 946 (Stevens, J., concurring and dissenting, with Ginsburg, Breyer, and Sotomayor, JJ.). It is an illicit extrapolation for the Ninth Circuit to hold that those cases (only those cases) authorize UC's viewpoint discrimination.

Finley, *ALA*, and *Forbes* only allow content-based decisions in one very limited circumstance—when government selects among speech to subsidize—or as *ALA* described their rule, when government selects "what private speech to make available to the public" with government subsidy. *ALA*, 539 U.S. at 204. It is a huge extrapolation for the Ninth Circuit to hold that those cases generally allow content-based decisions whenever "government provides a public service" and claims a need to select among speech. App. 2a.

Moreover, those decisions expressly state that

they do not apply to regulation of private speech at all, such as that of private schools here. *Finley* warned "the Government may allocate competitive funding according to criteria *that would be impermissible were direct regulation of speech . . . at stake*," 524 U.S. at 587-88 (as it is here), and *Finley* did not regulate any private speech. *ALA* did not "regulate private conduct" at all, but federal government grants to public libraries. 539 U.S. at 203 n.2. *Forbes* did not regulate any private speech, but merely determined whether public television's editorial discretion could select only major candidates for free televised debates. Again the extrapolation was indefensible.

Whatever those decisions mean, they do not declare open season for viewpoint discrimination whenever "government provides a public service" and claims a need to make distinctions based on the content of speech, and they do not apply to regulation of private speech or provide a general license to kill religious viewpoints. The three decisions are a narrow exception from the general rule of strict scrutiny, upholding only those content-based decisions that involve government selection among speech to subsidize or to admit to a nonpublic forum,[14] else they would swallow up the general protection of freedom of speech from content discrimination (and from viewpoint discrimination). The Ninth Circuit's extrapolation of those decisions to viewpoint dis-

[14] This case does not involve a forum (public, designated, limited, or nonpublic), in private religious high school courses or in UC course description review, as the Ninth Circuit and the parties agree. App. 2a. Otherwise, viewpoint discrimination would be forbidden regardless of the category of forum.

crimination, to whenever government provides a public service, and to regulation of private speech finds no support in those decisions or other decisions of this Court.

Rather than extrapolating those three cases, the Ninth Circuit should have applied this Court's viewpoint discrimination cases and its university cases (*Rosenberger*, *Southworth*, *Widmar*, and *Bakke*).

C. The Ninth Circuit's Rulings that Constrictively Reinterpreted Each First Amendment Clause To Uphold, the Association Standing Test To Deny Standing to Raise, and the Overbreadth Doctrine to Ignore, 150 Other UC Course Rejections for Adding a Religious Viewpoint, Conflict with Decisions of This Court and Other Circuits, and Warrant Granting the Petition.

1. The Ninth Circuit Constrictively Reinterpreted Each First Amendment Clause in Upholding UC Rejection of Courses for Adding a Religious Viewpoint, Contrary to Decisions of This Court and Other Circuits.

The Ninth Circuit, and the district court it affirmed, eviscerated each First Amendment provision when it upheld UC's discrimination against religious speech added to standard content in private schools. App. 6a-9a.

The Ninth Circuit misdescribed, and sustained,

the district court holding that added an animus requirement to free speech claims. The district court, in its discussion of the Free Speech Clause, held that "the decision to reject a course is constitutional as long as: (1) UC did not reject the course because of animus; and (2) UC had a rational basis for rejecting the course." App. 25a; *accord* 103a, 64a. It held that "under the Free Speech Clause" as well as under the Free Exercise Clause an "animus requirement is equally applicable" to challenges that "the government is punishing disfavored viewpoints," and upheld UC's actions as "not motivated by animus in setting the A-G Guidelines and Policies." App. 81a, 86a. That conflicts with this Court's determination that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment" in *City of Cincinnati*, 507 U.S. at 429, and that there is no requirement "of an improper censorial motive" in *Simon & Schuster*, 502 U.S. at 117.

The Ninth Circuit caricatured ACSI's and Calvary's establishment claim, that hostility to religion is flatly prohibited and should not be evaluated using the *Lemon* test, and upheld the district court's ruling that UC's rejection of courses because of an added religious viewpoint did not violate the *Lemon* test. App. 7a-8a, 95a-98a. That conflicts with this Court's statements that hostility toward religion violates the Establishment Clause, with no hint of limiting that to only such hostility as has a wholly nonsecular purpose or a hostile primary effect, in *Van Orden v. Perry*, 545 U.S. 677, 684 (2005) (plurality); *Rosenberger*, 515 U.S. at 845-46; *Mergens*, 496 U.S. at 248; and *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). "If a State refused to let religious groups use facilities open to others, then it would demonstrate

not neutrality but hostility toward religion." *Mergens*, *id.*

The court below erroneously refused to recognize or protect hybrid free exercise claims, saying it "'declin[ed] to be the first' court to allow... the hybrid-rights doctrine." App. 8a. Thus, it denied strict scrutiny to the claim that UC's rejection of courses with added religious viewpoints violated First Amendment protections for religious association in religious schools, and for religious speech in their curriculum. (ER1350.) That conflicts with this Court—which was "the first Court to allow... the hybrid-rights doctrine"—in *Employment Div. v. Smith*, 494 U.S. 872, 881, 882 (1990). The Ninth Circuit also erroneously refused to apply strict scrutiny to "individualized governmental assessments"—UC's course rejections—that were religiously discriminatory. That conflicts with *Smith*, 494 U.S. at 884, and, as *Smith* interpreted it, *id.* at 884, with *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963). Finally, the Ninth Circuit erroneously refused to employ strict scrutiny for ACSI's religious discrimination claim brought under *Smith* and *Lukumi*, since "UC's policies were more akin to the civil regulation that was upheld in *Locke v. Davey*, 504 U.S. 712 (2004), than the criminal prohibition that was invalidated in *Church of the Lukumi Babalu Aye*." App. 8a. That conflicts with the strict scrutiny of religious discrimination required by *Smith*, 494 U.S. at 886 n.3, and *Lukumi*, 508 U.S. 520, 546-47 (1993).

Finally, the Ninth Circuit erroneously "applied rational basis scrutiny to the plaintiffs' equal protection claim," on the basis that, despite UC rejection of courses with added religious viewpoints, there was

no "evidence that UC discriminates on the basis of religion," because "UC's course approval policy is the same for all in-state applicants, regardless of religion," and "whether a course is college preparatory is not a suspect classification." App. 8a-9a. However, UC's course approval policy is *not* the same for all added viewpoints (secular ones are nondisqualifying, religious ones are disqualifying), and UC's rejection of courses with religious viewpoints *does* involve a suspect classification (religion). The decision conflicts with the rule that "we strictly scrutinize governmental classifications based on religion." *Employment Division*, 494 U.S. at 886 n.3; *accord Lukumi*, 508 U.S. at 546.

2. The Ninth Circuit Constrictively Reinterpreted the Association Standing Test in Holding that the Nation's Largest Religious School Association Cannot Represent Its Members' As-Applied Claims, Contrary to Decisions of This Court, the Third Circuit (Then-Judge Alito), and the First and Seventh Circuits.

The Ninth Circuit refused to consider 34 of 38 rejected courses from ACSI member schools by rejecting ACSI's associational standing to bring as-applied challenges. App. 5a (ER118-24, 1981-2130). Those courses, in the subjects of history/government, English, biology, and religion, were part of the nearly 150 UC rejections of religious school courses because a religious viewpoint was added—not of any lack of standard content. App. 103a (ER443-86, 750-77).

The Ninth Circuit did so by gutting the association standing test of this Court and other circuits to

deny a national association standing to raise as-applied viewpoint discrimination claims "representing [its] more than 800 religious schools in California" (ER1296) against the state university system. App. 5a-6a. It reinterpreted the third prong of the associational standing test in *Hunt*, which requires that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). The Ninth Circuit ruled that "ACSI cannot satisfy the third prong" of *Hunt* because "plaintiffs' as-applied claims and the relief they seek, although equitable in nature, both require 'individualized proof specific to each rejected course and the school that offered it." App. 5a.

The Ninth Circuit's reinterpretation of *Hunt*'s third prong conflicts with the First, Third, and Seventh Circuits, which hold (in the words of then-Judge Alito) that standing is not barred even if it "requires participation of *some* members" as parties, because *Hunt*'s prong allows association standing (quoting *Warth*) "so long as the nature of the claim and of the relief sought does not make the individual participation of *each injured party indispensable*." *Hospital Council v. City of Pittsburgh*, 949 F.2d 83, 89 (3d Cir. 1991) (emphasis in original). The Seventh Circuit expressly adopted then-Judge Alito's interpretation. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 601-02 (7th Cir. 1993). The First Circuit similarly held that "just because a claim may require proof specific to individual members of an association does not mean the members are required to participate *as parties*" in violation of *Hunt*'s prong. *Playboy Ent. v. PSC*, 906 F.2d 25, 35 (1st Cir. 1990).

Other circuits that have addressed the issue conflict with the Ninth Circuit's reinterpretation, and would allow ACSI standing, particularly as here where an association is ideally suited to bring claims because each school's course description and UC's rejection were in UC's own documents. (*E.g.*, ER1981-2204.)

The Ninth Circuit's reinterpretation also erases the welcome bright line, that association standing is consistently allowed for injunctive and declaratory claims (like ACSI's claims), but is consistently denied for damages claims. *Hunt*, 432 U.S. at 343; *Warth v. Seldin*, 422 U.S. 490, 511, 515 (1975). Effectively, the Ninth Circuit would have precluded the association in *Hunt* from bringing its as-applied claims. 432 U.S. at 340-41.

3. The Ninth Circuit Constrictively Reinterpreted the Overbreadth Doctrine in Refusing To Consider the Practice of Nearly 150 Other UC Course Rejections for Adding a Religious Viewpoint (in Catholic, Jewish, and Protestant Schools), Contrary to Decisions of This Court and Other Circuits.

The Ninth Circuit reinterpreted the overbreadth doctrine, by refusing to consider the acknowledged "150 courses rejected by UC," App. 9a-10a, and thus claimed ACSI had "not alleged facts showing any risk that UC's policy will lead to the suppression of speech," and had not shown "that UC has a well established practice of rejecting courses with standard content solely because they add a religious viewpoint." App. 3a,4a.[15] The appellate court did so by

[15] Yet UC had conceded the wrongful refusal to use the

creating a barrier before overbreadth is considered, requiring that plaintiffs must first "'provide an analysis as to why any of the more than 150 courses rejected by UC should have been approved.'" App. 10a. However, the question is whether UC rejected courses for unconstitutional stated reasons, not whether those courses each qualified otherwise for approval.[16] The determinant for whether state action "may be invalidated as overbroad [is] if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.' *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n.6 (2008)." *United States v. Stevens*, 130 S.Ct. 1577. 1587 (2010). The express policy or practice of rejecting courses because of added religious viewpoints, and the nearly 150 courses rejected on that basis, both show "a substantial number of applications" that are unconstitutional. The Ninth Circuit wrongly refused to consider the 150 courses, because of its new barrier that plaintiffs first show each unconstitutional instance would otherwise have succeeded. *E.g.*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992).

The Ninth Circuit ended, after refusing to consider the 150 courses, by contending that "plaintiffs failed to provide any evidence of punishment, or even a chilling effect." App. 10a. The district court conceded that, if the 150 courses were considered and showed a policy of rejecting courses with an

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overbreadth doctrine by not responding in its appellate brief.

[16] ACSI *did* provide an analysis as to how each of the nearly 150 courses including the 5 Calvary courses was rejected for unconstitutional reasons. ER443-86,750-77,118-24,126-34,233-51,285-97,323-48,360-81.

added religious viewpoint, that policy "would likely cause Defendants to incorrectly reject a large number of courses that meet UC's academic standards." App. 87a. This Court's rule is that "the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court," and too broad a sweep "penaliz[es] a substantial amount of speech that is constitutionally protected." *Forsyth County*, 505 U.S.at 129-30. The overbreadth doctrine should have been employed, not refused.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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